

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Governmental Oversight and Accountability

BILL: SB 1290

INTRODUCER: Senator Altman and others

SUBJECT: Transportation Services Procurement

DATE: March 18, 2014

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	McKay	McVaney	GO	Pre-meeting
2.			TR	
3.			AP	

I. Summary:

SB 1290 creates a new provision within the state agency procurement laws mandating that solicitations for cargo, freight, and package delivery must require responding vendors to disclose information related to how the vendor’s services will impact energy consumption and pollution reduction.

II. Present Situation:

State Procurement of and Contracts for Personal Property and Services

Chapter 287, F.S., regulates state agency¹ procurement of personal property² and services.³ The Department of Management Services (DMS) is responsible for overseeing state purchasing activity including professional and contractual services as well as commodities needed to support agency activities, such as office supplies, vehicles, and information technology.⁴ The Division of State Purchasing in the DMS establishes statewide purchasing rules and negotiates contracts and purchasing agreements that are intended to leverage the state’s buying power.

¹ As defined in s. 287.012(1), F.S., “agency” means any of the various state officers, departments, boards, commissions, divisions, bureaus, and councils and any other unit of organization, however designated, of the executive branch of state government. “Agency” does not include the university and college boards of trustees or the state universities and colleges.

² Personal property” is not independently defined for purposes of ch. 287, F.S., but the chapter title for Chapter 287, F.S., is “Procurement of Personal Property and Services.” Additionally, the definition of “commodity” in s. 287.012(5), F.S., is “any of the various supplies, materials, goods, merchandise, food, equipment, information technology, and other personal property, including a mobile home, trailer, or other portable structure that has less than 5,000 square feet of floor space, purchased, leased, or otherwise contracted for by the state and its agencies.” This definition is used in Part I of Ch. 287, F.S., “Commodities, Insurance, and Contractual Services.”

³ Local governments are not subject to the provisions of ch. 287, F.S. Local governmental units may look to the chapter for guidance in the procurement of goods and services, but many have local policies or ordinances to address competitive solicitations.

⁴ See ss. 287.032 and 287.042, F.S.

Agencies may use a variety of procurement methods, depending on the cost and characteristics of the needed good or service, the complexity of the procurement, and the number of available vendors. These include the following:

- Single source contracts, which are used when an agency determines that only one vendor is available to provide a commodity or service at the time of purchase;
- Invitations to bid, which are used when an agency determines that standard services or goods will meet needs, wide competition is available, and the vendor's experience will not greatly influence the agency's results;
- Requests for proposals (RFP), which are used when the procurement requirements allow for consideration of various solutions and the agency believes more than two or three vendors exist who can provide the required goods or services; and
- Invitations to negotiate (ITN), which are used when negotiations are determined to be necessary to obtain the best value and involve a request for high complexity, customized, mission-critical services, by an agency dealing with a limited number of vendors.⁵

Criteria used to evaluate proposals received pursuant to a request for proposals must include, but are not limited to:

- Price;
- Renewal price, if renewal is contemplated; and
- Consideration of the total cost for each year of the contract, including renewal years, as submitted by the vendor.⁶

In invitations to negotiate, the criteria to be used in determining the acceptability of the reply and guiding the selection of the vendors with which the agency will negotiate must be specified in the ITN.⁷

Contracts for commodities or contractual services in excess of \$35,000 must be procured utilizing a competitive solicitation process.⁸ However, specified contractual services and commodities are not subject to competitive solicitation requirements.⁹

The chapter establishes a process by which a person may file an action protesting a decision or intended decision pertaining to contracts administered by the DMS, a water management district, or certain other agencies.¹⁰

⁵ See ss. 287.012(6) and 287.057, F.S.

⁶ Section 287.057(1)(b)3., F.S.

⁷ Section 287.057(1)(c)3., F.S.

⁸ Section 287.057(1), F.S., requires all projects that exceed the Category Two (\$35,000) threshold contained in s. 287.017, F.S., to be competitively bid. As defined in s. 287.012(6), F.S., "competitive solicitation" means the process of requesting and receiving two or more sealed bids, proposals, or replies submitted by responsive vendors in accordance with the terms of a competitive process, regardless of the method of procurement.

⁹ See s. 287.057(3)(f), F.S.

¹⁰ See s. 287.042(2)(c), F.S.

Rulemaking and the Administrative Procedure Act

The Administrative Procedure Act (APA) in ch. 120, F.S., sets forth a uniform set of procedures that agencies must follow when exercising delegated rulemaking authority. A rule is an agency statement of general applicability which interprets, implements, or prescribes law or policy, including the procedure and practice requirements of an agency.¹¹ Rulemaking authority is delegated by the Legislature¹² through statute and authorizes an agency to “adopt, develop, establish, or otherwise create”¹³ a rule. Agencies do not have discretion whether or not to engage in rulemaking.¹⁴ To adopt a rule, an agency must have a general grant of authority to implement a specific law through rulemaking.¹⁵ The grant of rulemaking authority itself need not be detailed.¹⁶ The specific statute being interpreted or implemented through rulemaking must provide specific standards and guidelines to preclude the administrative agency from exercising unbridled discretion in creating policy or applying the law.¹⁷

III. Effect of Proposed Changes:

The bill creates s. 287.0836, F.S., relating to sustainable transportation services procurements.

The bill requires the DMS to adopt a rule requiring that a vendor submitting a proposal in response to a competitive solicitation for transportation services, including, but not limited to, cargo, freight, and package delivery, must disclose certain information regarding energy consumption. The rule must provide that each solicitation for the procurement for transportation services require the vendor to disclose how its services will:

- Reduce regulated pollutants from mobile sources used in providing the services;
- Reduce regulated pollutants from stationary sources used in providing the services;
- Reduce the overall consumption of conventional oil and gasoline from strategic capital investments made by the vendor;
- Stimulate capital investment of new fueling infrastructure that results in the use of more fuel-efficient vehicles; and
- Lower the long-term fuel costs of the services by reducing fuel consumption.

By January 1, 2015, the DMS must publish a notice of proposed rule for the required rule.

The bill provides that if the DMS desires to comment on the combined economic and environmental impacts of implementing the bill, the DMS may submit a written report to the President of the Senate and the Speaker of the House of Representatives.

¹¹ Section 120.52(16), F.S.; *Florida Department of Financial Services v. Capital Collateral Regional Counsel-Middle Region*, 969 So. 2d 527, 530 (Fla. 1st DCA 2007).

¹² *Southwest Florida Water Management District v. Save the Manatee Club, Inc.*, 773 So. 2d 594 (Fla. 1st DCA 2000).

¹³ Section 120.52(17), F.S.

¹⁴ Section 120.54(1)(a), F.S.

¹⁵ Sections 120.52(8) and 120.536(1), F.S.

¹⁶ *Save the Manatee Club, Inc.*, *supra* at 599.

¹⁷ *Sloban v. Florida Board of Pharmacy*, 982 So. 2d 26, 29-30 (Fla. 1st DCA 2008); *Board of Trustees of the Internal Improvement Trust Fund v. Day Cruise Association, Inc.*, 794 So. 2d 696, 704 (Fla. 1st DCA 2001).

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Indeterminate. If the bill is interpreted as a preference for fuel-efficient vendors which produce less pollution, vendors with those operational characteristics might obtain more contracts.

C. Government Sector Impact:

Indeterminate. The bill does not address price, and the interplay between the implied preference in the bill and cost is difficult to determine in advance.

VI. Technical Deficiencies:

None.

VII. Related Issues:

As drafted, the bill directs the DMS to make law by specifying the policies to be enacted in a rule. The bill should instead be drafted to directly specify what the law is, and mandate that the DMS adopt a rule implementing that law.

The whereas clauses are unnecessary to implementation of the bill, and might even cloud interpretation of the bill by using the phrase “encourages,” which, when read in conjunction with the substantive provisions, might create requirements that aren’t explicit in the substantive provisions. If there is information in the whereas clauses that is intended to be substantive, it should be included in the substantive provisions.

The bill specifies that solicitations require certain information from bidders, but doesn’t explicitly state that the supplied information is to be considered in evaluating solicitation

responses, or how much weight it is to be given. If the required information is to be given preferential weight in solicitation evaluations, the bill should so state. More broadly, if the legislature desires to have pollution and energy consumption considered in certain types of procurements, it may want to be more explicit and clear in doing so, in order facilitate implementation of that policy goal.

The DMS may not have the subject matter expertise required to implement rules concerning pollution and energy consumption.

The purpose of subsection (3) of the bill is unclear.

VIII. Statutes Affected:

This bill creates section 287.0836 of the Florida Statutes.

IX. Additional Information:

A. **Committee Substitute – Statement of Changes:**
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. **Amendments:**

None.